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No. 09-872

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

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MICHAEL CASEY, *et al.*,

Petitioner,

v.

NORTH AMERICAN SAVINGS, F.S.B., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether 12 C.F.R. § 560.2, which preempts state laws that purport to regulate "[l]oan-related fees" by federal savings banks, preempts state-law claims by residential mortgage borrowers asserting that it was unlawful for federal savings banks to charge a document preparation fee in connection with their loans.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 29.6, respondents state as follows:

Respondent ABN-AMRO Mortgage Group, Inc. has been merged into Citimortgage, Inc. The present ultimate parent of Citimortgage, Inc., is Citigroup, Inc. As a result of past transactions, Bank of America Corp., through various subsidiaries, retains an interest in this litigation. Citigroup, Inc., owns 10% or more of ABN-AMRO stock.

Respondent North American Savings Bank, F.S.B. is owned by NASB Financial, Inc. NASB Financial, Inc. owns 10% or more of North American Savings Bank, Inc. stock.

Respondent Heartland Bank is owned by Love Savings Holding Company. No public companies own more than 10% of Heartland Bank stock.

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BRIEF IN OPPOSITION

Petitioners obtained residential home loans from federally chartered savings associations. In connection with their loans, petitioners were charged a fully disclosed fee for the preparation of the documents necessary to close their loans. Missouri's rules regarding the practice of law do not prohibit non-lawyers from preparing these legal documents. Instead, Missouri law at the relevant time prohibited a non-lawyer who prepares such documents from charging a fee for doing so. *Eisel* v. *Midwest BankCentre*, 230 S.W.3d 335 (Mo. 2007) (per curiam).[1] Petitioners sued various federal savings banks, including respondents here, alleging that they had violated Missouri's rules regarding the unauthorized practice of law by charging their respective loan document preparation fees.

The Eighth Circuit affirmed a trial court ruling that petitioners' claims were preempted by the Home Owners' Loan Act, 12 U.S.C. § 1461 *et seq.* ("HOLA") and the Office of Thrift Supervision ("OTS") regulation implementing HOLA, 12 C.F.R. § 560.2. As this Court has observed, HOLA expresses Congress's intent to provide OTS broad authority to adopt regulations ensuring that federal savings banks "would be governed by what the [OTS]—not any particular State—deemed to be the 'best practices.'" *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 161-62 (1982). And OTS has

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[1] After the claims in this case were filed, the Missouri legislature amended the relevant Missouri statute to provide that a non-lawyer preparing the documents at issue here may charge a fee of up to $200 without engaging in the unauthorized practice of law. Mo. Rev. Stat. § 484.025. The fees at issue in this case were charged prior to the amendment of Missouri law.

expressly "occupie[d] the entire field" of regulating the lending activities of federal savings banks. 12 C.F.R. § 560.2(a). Indeed, among the illustrative examples of lending activities that OTS has determined should be subject to uniform federal regulation, and exempted from varying state regulatory regimes, are "[l]oan-related fees." *Id.* § 560.2(b)(5).

As petitioners' claims seek to use state law to challenge the lawfulness of a loan-related fee, their claims are clearly preempted by § 560.2(b)(5). Petitioners try to escape the unambiguous preemptive force of OTS's regulation by arguing that their claims are brought pursuant to Missouri laws that, *on their face*, do not concern themselves with lending. That is, the Missouri laws do not specifically say they are to be used to regulate lending activities. Petitioners' argument has been rejected by every federal appellate court to have considered it, and by the agency promulgating the federal regulations in question. A state law is preempted if, *as the petitioners seek to apply it*, that law would regulate the lending activities of a federal savings bank.

There is no split of authority. The law and regulation are being applied by the federal courts of appeals precisely as they are written, and in a manner that is fully consistent with the intent of both Congress and the OTS. Finally, there is no concern that the courts of appeals' proper interpretation of this particular regulation will have any impact on the preemptive effect of any other federal regulatory regime. Review by this Court is unwarranted. The petition should be denied.

COUNTERSTATEMENT OF THE CASE

This action, originally filed in Missouri state court, arises out of residential mortgage loans made by

respondent banks to petitioners in the state of Missouri. Respondents were federally chartered savings associations duly authorized to conduct business in the state of Missouri. Pet. App. A1-3. As such, respondents' lending activities at issue here are regulated by the OTS, which is a bureau of the Department of the Treasury. Petitioners are individual borrowers who received loans from the respondent banks. *Id.* at A2-3.

In connection with their loans, each petitioner was charged a fee for the preparation of documents necessary to close the loan. It is agreed that the document preparation fee was fully disclosed to each borrower. Each petitioner paid the fee without objection at the time his or her transaction closed.

Petitioners' complaint asserted that the lenders had, as a matter of Missouri law, engaged in the unauthorized practice of law by charging a fee for the preparation of documents in connection with their loans. Pet. at 2; Pet. App. A25-28. As originally filed, this action included claims asserted by numerous borrowers against numerous lenders, with only some of those lenders (including respondents here) having been federal savings banks. The Missouri state trial court dismissed the claims against the federal savings bank defendants on the ground that the claims were preempted by federal law, specifically HOLA and 12 C.F.R. § 560.2. Pet. App. A32-34.

While petitioners' appeal was pending before the Missouri Court of Appeals, one of the federal savings bank defendants, North American Mortgage Company, was placed into receivership by the FDIC. The FDIC was substituted into the action for North American Mortgage Company pursuant to 12 U.S.C. § 1821(d)(2)(A)(i) and Missouri Supreme Court Rule 52.13. Pet. App. A20. The FDIC then timely removed

the action to the federal district court for the Eastern District of Missouri pursuant to its authority under 12 U.S.C. § 1819(b)(2)(B). The district court adopted the state trial court's order as its own and transferred the case to the Eighth Circuit for review. *Id.* at A21-23. The borrower who had asserted a claim against North American Mortgage Company then dismissed his claim against the FDIC, leaving only the claims against respondents (North American Savings Bank, F.S.B., Heartland Bank, and ABN AMRO Mortgage Group, Inc.) for resolution by the court of appeals. *Id.* at A2.

As relevant here, the Eighth Circuit affirmed the dismissal on the ground that the claims against the federal savings banks are preempted. The court of appeals began by observing that 12 C.F.R. § 560.2 is a regulation promulgated by the OTS, and that OTS has provided interpretive guidelines for applying its regulation. Pet. App. A10-11. The first step in the process of applying the regulation is to examine whether the law being asserted by the plaintiff "fall[s] within the scope of § 560.2(b)," because if it does, the interpretive guidelines clearly state that the analysis ends and the law is preempted. *Id.* at A12. Section 560.2 provides that "state laws purporting to regulate .... [l]oan-related fees, including without limitation, initial charges" are preempted. 12 C.F.R. § 560.2(a), (b)(5); *see also* Pet. App. A12.

Petitioners' complaint did not challenge that the document preparation fees at issue here are "loan-related fees" within the meaning of the regulation. Pet. App. A18. Rather, they claimed that the word "purporting" in § 560.2(b) limits the preemptive scope of the regulation to laws that "*on their face* impose requirements expressly upon lenders." *Id.* at A12. None of the state laws upon which petitioners' claims

were based—the Missouri law business statute, Mo. Rev. Stat. § 484.020, the Missouri Merchandise Practices Act, *id.* § 407.010 *et seq.*, and Missouri's common law remedy for money had and received—on their face regulate loan-related fees. But it was undisputed that, as petitioners sought to apply those state laws, they would have the effect of regulating loan-related fees by federal savings banks. Thus the Eighth Circuit had to determine whether OTS's express identification of lending activities in subsection (b) of its regulation preempted state laws only to the extent they seek to regulate those activities on their face, or whether the regulation should be understood to apply to state laws that, as the plaintiffs seek to apply them, would have the effect of regulating those activities. Pet. App. A12-13.

The court of appeals "conclude[d] that a state law that either on its face or as applied imposes requirements regarding [the lending activities] listed in § 560.2(b) is preempted." Pet. App. A16 (footnote omitted). In so holding, the Eighth Circuit agreed with the analysis of the Ninth Circuit, which also had concluded that the as-applied approach was correct. *Id.* at A13 (discussing *Silvas* v. *E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008)). The Eighth Circuit also observed that the Seventh Circuit has likewise examined how state-law claims seek to apply state laws that do not specifically refer to lending activities in determining whether the claims are preempted under § 560.2(b). *Id.* at A16 n.3 (discussing *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638 (7th Cir. 2007)). The Eighth Circuit also relied on statements from OTS itself. Two opinion letters from the OTS Chief Counsel both indicate that the agency believes it is necessary to determine how a plaintiff seeks to apply

a particular state law before concluding whether the state law claim should be preempted under the regulation. *Id.* at A14-15 (discussing OTS Opinion P-99-3 (Mar. 10, 1999) and OTS Opinion (Dec. 24, 1996)). Finally, the Eighth Circuit noted that OTS had filed a brief in a case litigated in Illinois state court which concerned claims seeking to recover document preparation fees from federal savings banks under state law. In that brief, the OTS "maintained that the [Illinois] statute [which did not mention lending on its face] was nevertheless preempted because, as applied, it imposed requirements regarding loan related fees—making it one of the types of laws enumerated in § 560.2(b)." *Id.* at A15.

Because petitioners were seeking to use Missouri state law to "impose requirements relating to document preparation fees in mortgage transactions," the Eighth Circuit concluded that their claims were preempted by § 560.2(b). It therefore affirmed the judgment of the trial court.

REASONS FOR DENYING THE PETITION

1. Under HOLA, Congress explicitly delegated to OTS the authority to preempt state laws as they apply to the lending operations of federal savings associations. HOLA specifically provides that OTS is authorized "to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings association." 12 U.S.C. § 1464(a)(1). This Court has found that the grant of preemptive authority is clear.

> The broad language of § [1464](a) expresses no limits on the [OTS]'s authority to regulate the lending practices of federal savings and loans....

> ... Congress plainly envisioned that federal savings and loans would be governed by what the [OTS]—not any particular State—deemed to be the "best practices." Thus, the statutory language suggests that Congress expressly contemplated, and approved, the [OTS's] promulgation of regulations superseding state law.

Fidelity Fed. Sav. & Loan Ass'n, 458 U.S. at 161-62 (citation omitted).

OTS has expressly preempted the entire field of lending regulations applicable to federal savings associations. 12 C.F.R. § 560.2(a). Preemption extends to any state law that impacts the lending activity of federal savings associations:

> Occupation of field.... To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities .... For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

Id. OTS has made clear that the purpose of its broad preemption regulation is to implement Congress's

intent of freeing federal savings associations from "a hodgepodge of conflicting and overlapping state lending requirements," so that they may "originate loans under a single set of uniform federal laws and regulations." 61 Fed. Reg. 50951, 50965 (Sept. 30, 1996).

OTS's preemptive regulation, 12 C.F.R. § 560.2, contains three subsections: (a), (b), and (c). Subsection (a) declares OTS's objective to occupy "the entire field of lending regulation" and its policy of establishing a "uniform federal scheme of regulation." Subsection (b) follows with an illustrative (but not comprehensive) list of clearly preempted lending activities. Subsection (c) concludes with a list of state laws that are not preempted "to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with purposes of" the broad preemption and uniform regulatory policies of subsection (a).

The issue in this case concerns how to apply this regulation. And OTS has issued guidelines that provide a step-by-step method for doing so.

> When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be construed narrowly. Any doubt should be resolved in favor of preemption.

61 Fed. Reg. at 50966-67. Petitioners have not disputed that OTS's interpretation of its own regulation is entitled to deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (A federal agency's interpretation of its own regulations is entitled to deference "unless plainly erroneous or inconsistent with the regulation.") (internal quotation marks omitted).

One of the lending activities specifically identified in subsection (b) of the regulation is the charging of "[l]oan-related fees." 12 C.F.R. § 560.2(b)(5). As discussed above, in light of the undisputed fact that petitioners are seeking, in this lawsuit, to challenge the charging of a such a loan-related fee, the Eighth Circuit concluded that petitioners' claims fail at the first step of the preemption analysis. Pet. App. A18, (citing 12 C.F.R. § 560.2(b)(5)).[2] Contrary to petitioners' suggestion, there is nothing controversial about that ruling. It applies OTS's regulation in a manner consistent with every other court of appeals to have considered the question, and indeed, in precisely the manner that OTS itself has indicated it should be applied. And no other area of law has been cast into doubt by the Eighth Circuit's straight-forward application of this regulation.

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[2] Though petitioners believe that their claims are not preempted by § 560.2(b), they do not even try to explain how if their claims survived this "first step" in the preemption analysis, their claims could also survive the remainder of the analysis. They would still have to show that their claims only "incidentally" affect lending under § 560.2(c), which OTS has indicated should be interpreted as a "narrow" exception to preemption, and that courts should resolve doubts in favor of preemption. Because petitioners can offer no such explanation, this case presents a poor vehicle to consider the question presented.

2. Petitioners assert that the Eighth Circuit's decision deepens a split of authority among the circuits. Pet. 24-25. That is not so, as the Eighth Circuit itself recognized. Pet. App. A13-14, A16 n.3. To the contrary, the Eighth Circuit would have *created* a split authority where there is none, had it adopted petitioners' proposed interpretation of the regulation.

Petitioners claim that the Seventh Circuit's decision in *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, 491 F.3d 638 (7th Cir. 2007), diverges from the Eighth Circuit's decision here because the Seventh Circuit concluded that certain claims brought under state deceptive practices acts may not be preempted. Pet. 25. But the Seventh Circuit's recognition that *some* claims against federal savings bank may not be preempted is beside the point. The Seventh Circuit's discussion of the "sprawling" pleading in *Ocwen*, 491 F.3d at 641, makes clear that some claims can be preempted even as other claims are not. What matters is *how* the Seventh Circuit distinguished between the two. Though numerous claims were asserted under various state deceptive trade practices acts, the Seventh Circuit did not determine preemption, as petitioners propose, by looking at each act *on its face* to see if any mention is made of regulating lending. Rather, it looked to how the complaint purported to *apply* those laws and stated that the applications seeking to regulate lending were preempted and those that assert more general grievances (like standard breach of contract or fraud) are not. *Id.* at 646-48. Indeed, when the Seventh Circuit considered whether a state unfair business practices act could be used to challenge fees charged by the lender, the

court stated that such a claim would be "clearly preempted" by § 560.2(b). *Id.* at 646-67.

In the respect that matters—examining a pleading to determine whether a state law, *as applied*, would impermissibly regulate the lending activities of a federal savings bank, *Ocwen* is perfectly in accord with the Ninth Circuit's decision in *Silvas* v. *E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008). The Ninth Circuit examined the regulations and concluded that its job was to determine whether a California law that on its face said nothing about lending was nonetheless impermissibly being used to regulate one of the lending activities identified in § 560.2(b). *See id.* at 1005-07 & nn.1, 3. The Eighth Circuit's ruling here takes precisely the same approach. Therefore, there is no split of authority.

3. The as-applied approach to preemption that all three courts of appeals to have considered the question have adopted is fully supported by the statements of OTS. Petitioners mischaracterize both the OTS's opinion letters and the holding of the Eighth Circuit in an effort to create space between the two. In fact, they reflect precisely the same understanding of how § 560.2 works.

Two OTS opinion letters discuss how to analyze whether state deceptive practices acts are preempted. In the first, issued in 1996, OTS merely considered whether Indiana's deceptive trade practices act is preempted *on its face* by § 560.2. OTS Opinion at 9-10 (Dec. 24, 1996). OTS determined that it is not, which means only that OTS recognizes that there may be circumstances where such a statute is asserted against a federal savings association in connection with activities that are not lending activities. But when the preemption question arises in the context of a particular claim, rather than a facial challenge to a

state law, OTS has made clear that the "preemption analysis requires consideration of the relationship between federal and state laws *as they are interpreted and applied, not merely as they are written.*" OTS Opinion P-99-3, at 12 (Mar. 10, 1999) (emphasis added). This is precisely what the Eighth Circuit did here, what the Seventh Circuit did in *Ocwen*, and what the Ninth Circuit did in *Silvas*.

Furthermore, the Eighth Circuit found "highly informative"—and Petitioners completely ignore—additional authority confirming that the OTS has ratified the as-applied approach. In *Jenkins* v. *Concorde Acceptance Corp.*, 802 N.E.2d 1270 (Ill. App. Ct. 2003), *aff'd*, 828 N.E.2d 1155 (Ill. 2005). the plaintiffs sought to enforce a state statute prohibiting non-lawyers from charging legal fees against a bank that charged for document preparation. *Id.* at 1274. The OTS filed an *amicus curiae* brief arguing that, even though the statute was facially neutral, as applied to the defendant bank it was preempted by § 560.2(b). Pet. App. A15.

Petitioners rightly point out that the OTS opinions do not support preemption of a state deceptive practices act "as a whole simply because it is being used in some cases in an attempt to regulate [l]enders." Pet. 23. But the Eighth Circuit did not declare that any Missouri law is preempted "as a whole" by § 560.2. The Eighth Circuit concluded that the petitioners were impermissibly trying to use Missouri law to regulate lenders, which is, as petitioners nearly admit, OTS's position as well.

OTS's as-applied approach, adopted by the various courts of appeals, is also not contrary to the plain language of the regulation. Petitioner claims that the word "purporting" in § 560.2(b) makes preemption contingent on whether the challenged state law "had

the purpose of regulating the credit activities of federal savings associations." Pet. 18. Such a reading of the regulation would not only impose serious practical burdens on courts, it would also work against OTS's own stated policy to enable federal savings associations to operate "under a single set of uniform federal laws and regulations." 61 Fed. Reg. at 50965. What matters from the point of view of federal policy is that lenders at federal savings associations know that there is one body of law to which they must adhere when engaged in lending activities. Whether as a matter of purpose or effect, a state law that imposes requirements on the lending activities of federal savings associations contravenes federal policy. Petitioners brought such a claim, and consistent with all the authority discussed above, it was properly determined to be preempted.

4. Petitioners' final gasp concerns the supposed far-reaching consequences of the Eighth Circuit's ruling. Pet. 27-30. That is nonsense. The Eighth Circuit's ruling interprets a particular regulation consistently with that of every other court of appeals to consider the issue and the agency that promulgated it, as well as its express policy. That interpretation is both sound and tied to the particulars of this regulatory regime. There is no disruption of settled law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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